BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TOMAS L. SERRA	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,027,810,
KANSAS CITY KANSAS HOUSING AUTHORITY	)	1,027,811 & 1,027,812
Respondent	)	
AND	)	
	)	
HARTFORD CASUALTY INSURANCE COMPANY	)	
and LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant appeals the June 5, 2006 preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to provide timely notice of his alleged accidents.

ISSUE

Did claimant provide timely notice of his alleged accidents?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed in part and reversed in part.

Claimant, a 23-year employee of respondent, worked there as a housing inspector. Claimant has alleged three separate accidents while performing the housing inspector's duties. The first, in Docket No. 1,027,810, alleges an accident date involving a series of accidents through June 17, 2004. The second claim alleges a series of accidents through September 24, 2004, in Docket No. 1,027,811. The third

claim, in Docket No. 1,027,812, alleges a series of accidents through October 11, 2005, claimant's last day worked with respondent.[1]

With the exception of a specific incident in 2004, these injury claims are all microtrauma-type accidents. Claimant testified to a specific incident in September 2004, when, as he was preparing to enter a car, he looked down and experienced an electric-shock type of pain. He related this incident to his supervisor, Tony Shomin, telling Mr. Shomin that he (claimant) had experienced a shock as he opened a car door and was starting to get in. The remainder of claimant's injury claims are microtrauma-type injuries experienced over a long period of time.

Claimant was asked both on direct and on cross-examination, whether he reported any of these respective trauma injuries as workers compensation injuries. Claimant testified that except for the September 24, 2004 incident, he never reported any of the injuries as work related, never claimed workers compensation benefits, and never requested medical treatment for these injuries through the workers compensation system until several months after he last worked for respondent, on October 5, 2005.[2]

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

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[1] On page 52 of the preliminary hearing transcript, there is testimony from Thomas Scott, respondent's director of facilities management, that claimant went off on leave again on October 5, 2005. However, in looking at Respondent's Exhibit A, it appears claimant worked 3 hours on October 7, 2005 (and used 5 hours of sick leave) and that he worked 5 hours on October 10, 2005 (and used 3 hours of sick leave). Also, on pages 15-16 of the preliminary hearing transcript, it is stated that the records indicate claimant went off work October 11, 2005, and claimant confirmed that that was correct.

[2] *See* Footnote No. 1.

[3] K.S.A. 44-501 and K.S.A. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

not bound by medical evidence presented in the case and has the responsibility of making its own determination.[5]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .

The notice requirements of K.S.A. 44-520 mandate that the employer be informed of the time, place and particulars of a work-related accident. Claimant's testimony regarding his conversation with Tony, his supervisor, after the specific injury on September 24, 2004, is uncontradicted. The Board finds notice of that incident was timely provided pursuant to K.S.A. 44-520. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[6]

However, claimant admits to providing respondent no information regarding the work-related nature of his many ongoing, physical microtrauma-type problems. While respondent was clearly aware that claimant had problems, notice of the work-related nature of those problems is still required. Claimant admits he provided no information to respondent that he was claiming workers compensation benefits for his many microtrauma injuries until long after his last day worked. The first time in this record that it can be verified that claimant told respondent of his work-related microtrauma-injury claims was during a telephone conversation with Thomas Scott, respondent's director of facilities management. Mr. Scott testified that claimant called him one week to ten days before receipt of a claim letter from claimant's attorney and informed Mr. Scott of claimant's intent to claim workers compensation benefits. This claim letter arrived at respondent's facility in March 2006. This is well beyond both the 10-day and 75-day time limits contained in K.S.A. 44-520.

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[5] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[6] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

The Board finds that claimant has failed to prove that he provided timely notice of these microtrauma injuries in violation of K.S.A. 44-520. While this seems a harsh result in this circumstance, the legislative intent of the notice statute is clear.

> It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.[7]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated June 5, 2006, should be, and is hereby, affirmed with regard to the alleged microtrauma-injury claims, but reversed as to the specific injury alleged on September 24, 2004.

IT IS SO ORDERED.

Dated this ____ day of September, 2006.

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Joseph Sean Dumm, Attorney for Respondent and its Insurance Carrier (Hartford)
Lynn M. Curtis, Attorney for Respondent and its Insurance Carrier (Liberty)

[7] *Matter of Marriage of Killman*, *supra* (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).